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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-191887

DATE: January 2, 1979

MATTER OF: Malott & Peterson-Grundy, Contractors; Vibra Whirl and Company

DIGEST: [Complainant's Bid Rejected as Nonresponsive Under Brand Name or Equal Solicitation Specification]

1. EDA grant allowed grantee to follow state and local law in conducting procurement, and provided that if no state or local law existed on particular point, FPR would be controlling. Complaint concerning bid responsiveness under brand name or equal invitation specification is reviewed under FPR because there is no state or local law for application other than general requirement for competition, which is consistent with Federal norm.

2. Grantee rejected as nonresponsive complainant's bid under brand name or equal solicitation specification because complainant failed to comply with solicitation requirement to submit prior to bid opening information on offered "equal" product. However, such failure should have been waived, since grantee was already in possession of sufficient information with which to judge product's acceptability.

3. After review by grantee's consulting engineer of literature and specifications regarding various track surfaces and site inspections, and discussions with manufacturers and track owners, grantee determined that minimum needs could only be met by use of brand name or equal specification which precluded track surfaces having sand or gravel fillers. GAO will not object to such determination, since minimum needs judgment is for using activity, and it has not been shown to be unreasonable.

4. Low bidder under solicitation issued pursuant to Federal grant failed to submit prior to bid opening information to show product's acceptability as "equal" under brand name or equal specification. Notwithstanding that grantee's rejection of bid for that reason may have been improper, bid was not acceptable where it is subsequently shown that bid was nonresponsive because product offered had sand-gravel filler specifically precluded by specification.

5. Grantee's IFB to install brand name or equal track required submission at least 10 days prior to bid opening by prospective "equal" basis bidders of certain listed information regarding acceptability of products. Grantee would then notify such firms at least 2 days before bids were due whether products were acceptable "equals." Where bidder failed to submit listed data regarding "equal" as required, notice provision was not operative.

6. GAO will not consider whether bidder on grantee procurement can recover bid preparation costs, since record shows that procurement was properly conducted, and claim for such costs could not, therefore, be allowed.

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Malott & Peterson-Grundy, Contractors, and Vibra Whirl and Company (Malott), have requested that we review the award of a contract to Atlas All-Weather Tracks (Atlas) by the Ysleta Independent School District, El Paso County, Texas, under a grant from the Economic Development Administration (EDA), Department of Commerce. Our review is undertaken pursuant to a Public Notice at 40 Fed. Reg. 42406, September 12, 1975, in which we stated that we would consider complaints concerning contracts awarded under Federal grants.

The grantee's invitation requested bids for the construction and renovation of outdoor recreational facilities. Section 1 of Part II required

the installation of an "Atlas All-Weather Track Surface, or an approved equal, on a previously constructed asphaltic concrete surface." It further stated:

> "For a material to be accepted as an approved equal, the following shall be submitted to the Engineer a minimum of ten (10) days prior to the date announced or advertised for the submission of Proposals:
>
> "1. Physical Description of Product
>
> "2. Physical Properties of Product
>
> "3. Chemical Composition of Product
>
> "4. Experience Resume of Manufacturer and Installer of Surface
>
> "5. Name and Location of at least 3 successful installations
>
> "6. Resume of Service of Completed Installations."

In addition, the section provided for inspection by the engineer of 2 of the listed completed installations. The engineer was to notify the bidder at least 2 days prior to the date bids were due whether the bidder's product was considered an acceptable "equal."

Malott was the apparent low bidder. However, Malott had drawn lines through the brand name "Atlas" that was preprinted in the invitation and had inserted the brand name "Reslite." Malott's bid was then determined nonresponsive because Malott had not complied with the procedural requirement set out above to

obtain approval of Reslite as an "equal" product. Award to Atlas, the second low bidder, was recommended.

In its complaint, Malott contends that the bid was responsive despite its failure to follow the cited procedure. The basis for that position is that the grantee "had actual knowledge of all prequalification requirements prior to the time of bid" because Reslite had been accepted in another current contract with the grantee, and the Reslite specifications had in fact been in the possession of the grantee's engineer 10 days prior to the date for submission of bids.

In a report on the complaint, EDA concedes that, on the basis of Malott's arguments and our decision at 40 Comp. Gen. 435 (1961), Malott's bid should not have been rejected as nonresponsive for failure to follow the procedures to establish Reslite as an "equal" product. We stated in the cited decision that examination of information already available to the contracting agency may be sufficient to accomplish the same purposes which would be accomplished by strict compliance with a solicitation requirement to submit descriptive data. See also E. I. duPont de Nemours & Company, B-191169, June 23, 1978, 78-1 CPD 458.

However, EDA contends that Malott's bid is nevertheless not acceptable for another reason. Part II, Section 2 of the grantee's solicitation, entitled "Materials," describes the Atlas track surface as follows:

> " * * * The material shall be as manufactured by Atlas track * * *. It shall be a mixture of rubber and binding compounds cohesively mixed and applied * * *. No sand or gravel filler shall be contained in the mixture." (Emphasis added.)

EDA states:

> "* * * the substituted material [Reslite], known by the grantee's engineer to contain a sand or gravel filler, would also have been refused acceptance as an approved equal because the IFB specifically prohibited a sand or gravel filler. * * * According to the engineer, the types of materials (rubber-asphalt, rubber-urethane, and urethane) utilized by the brand name products specified in the IFB were selected following an extensive investigation of track surfacing materials. Sand-asphalt-aggregate surfaces such as Reslite were not selected. * * *"

Malott has responded to the EDA position with a number of arguments. First, Malott contends that the sand-and-gravel-filler prohibition reflected an improper predetermination by the grantee to award a contract based on the Atlas track. Malott states:

> "* * * there are two different categories of track surface material. One is the polyurethane classification which is a more expensive track material than the liquid asphalt classification. ACI and Chevron are polyurethane while Atlas and Reslite are liquid asphalt. To our knowledge, Atlas is the only product in the liquid asphalt category that does not contain a sand or gravel filler. We seriously question that the grantee had enough money in its budget to pay for a polyurethane track or ever believed that a manufacturer of that material could be competitive with the liquid asphalt. * * * That leaves Atlas and the other

> liquid asphalt manufacturers as the only viable competitors and everyone except Atlas was eliminated by the 'no sand or gravel' requirement if the specifications are to be strictly enforced. Besides Reslite, the other potential bidders whose product contains a sand or gravel filler include Tracklite, Marathon, Rub-Kor, Uniroyal and Fast-Trac. * * *"

Thus, Malott argues that by rejecting its bid "there would have been no competition at all and the 'or equal' provision would have been meaningless since no other product but Atlas could have met the specifications as written."

Second, Malott has presented a letter dated April 20 in which the manufacturer of Reslite was advised by EDA that Reslite was not sufficiently durable for the grantee's needs. Malott argues that this was the real reason for the rejection of its bid, not the failure to prequalify its product as required by the solicitation, or the type of material contained in Reslite. On that basis, Malott contends that the school board made an erroneous and improper "independent, ex parte" determination that the Atlas product was more durable than Reslite, and thereby either "determined who the successful bidder would be prior to advertising for bids, or they failed to adequately notify the potential bidders of the subjective criteria that would be considered in making the award."

Third, Malott argues that, notwithstanding the solicitation's specifications, the fact that Malott's bid price was lower than Atlas' is sufficient justification for award to Malott in view of the general requirements in formally advertised procurements "that price and other factors be considered * * * and that competition be obtained to the maximum extent possible."

In addition, Malott argues that if in fact Reslite was not acceptable for any reason, Malott should have been so notified prior to bid opening, in accordance with Section 1 of Part II of the solicitation.

Finally, Malott contends that the arguments it has presented show that the grantee's actions with respect to the complainant were arbitrary and capricious, and requests that we therefore award the firm bid preparation costs.

The threshhold matter is to determine what law to apply in resolving the matters raised. The grant included EDA's Standard Grant Terms and Conditions, August 1977, which provided in paragraph 28 as follows:

> "The Grantee agrees that it may use its own procurement regulations which reflect applicable State and local law, rules and regulations, for procurements made with Federal grant funds, provided that the regulations adhere to the standards set forth in Attachment 0 of FMC [Federal Management Circular] 74-7, as amended [now superseded by Office of Management and Budget Circular No. A-102]. In the event that no State or local law exists as to a particular point in question, the Grantee agrees that the Federal Procurement Regulations will control consideration of the matter."

Attachment "0" to FMC 74-7 sets forth "Procurement Standards" for use by state and local Governments in establshing procedures for conducting procurements using Federal grant funds. It authorizes grantees to use their own procurement regulations provided the procurements adhere to certain listed basic Federal procurement standards.

Malott cites Texas statutes at Vernon's Ann. Civ. St. art. 1659, and V.T.C.A. Education Code § 21.901, for possible application to its complaint, although Malott contends that Federal procurement considerations are more directly applicable to the specific issues raised. The first Texas statute cited merely requires that supplies for county use "be purchased on competitive bids," with the contract awarded on the basis of "the lowest and best bid"; the second essentially requires that any proposed contracts by any Texas public school board be "submitted to competitive bidding." The statutes are consistent with basic Federal procurement requirements as reflected in FMC 74-7, that all purchases and contracts be made on a competitive basis to the maximum practicable extent, and that award under the preferred formal advertising method of procurement be made to the low responsive, responsible bidder. See Federal Procurement Regulations (FPR) §§ 1-1.301-1, 1-1.301-2 (1964 ed. amend 83), and § 1-2.101(d) (1964 ed. amend 95). EDA does not cite any other pertinent State or local statutes or cases, and our research does not disclose any Texas law on the specific issues raised in Malott's complaint.

Accordingly, and based on the terms of the EDA grant, we will review the complaint under Federal procurement law and regulations. See Edsall Construction Company, B-190722, March 29, 1978, 78-1 CPD 242.

Concerning the propriety of restricting competition by the use of the subject brand name or equal provision, paragraph 3b of Attachment "0" to FMC 74-7 requires that all procurements be conducted in a manner that provides "maximum open and free competition." That requirement clearly reflects both the Texas statutes quoted above and the Federal norm requiring the avoidance of restrictive specifications. See Powercon Corporation, 56 Comp. Gen. 912 (1977), 77-2 CPD 125; compare BBR Prestressed Tanks, 56 Comp. Gen. 575 (1977), 77-1 CPD 302. However, the mandate for maximum competition must be tempered by

the procuring activity's actual minimum needs, which may preclude competition by certain firms. To that end, Attachment "O" to FMC 74-7 authorizes in paragraph 3c the use of a brand name or equal specification, as follows:

> "The grantee shall establish procurement procedures which provide for, as a minimum, the following procedural requirements:
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> * * * * *
>
> "(2) Invitations for bids shall be based upon a clear and accurate description of the technical requirement for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition.
>
> "'Brand name or equal' descriptions may be used to define the performance or other salient requirements of a procurement, and when so used the specific features of the named brand which must be met by offerors should be clearly specified."

We have recognized as a basic principle of Federal procurement law to be followed by grantees that it is the responsibility of the procuring activity to establish its minimum needs. We will not, therefore, dispute the judgment that those minimum needs can only be met by the use of a brand name or equal specification, or the basis for such judgment, unless clearly shown by the objector to be unreasonable. The Babcock & Wilcox Company, 57 Comp. Gen. 85 (1977), 77-2 CPD 368.

The record includes a letter dated May 1, 1978, from the county's engineer to a school district representative concerning Malott's complaint. The letter states in pertinent part as follows:

> "* * * 'Reslite' was recommended in our preliminary engineering report as an accepted surface. * * * we had no time in which to investigate and evaluate the many types of surfacing materials prior to its preparation. 'Grasstex' and 'Reslite' as well as 'or equal products' were listed [in the preliminary report], principally to serve as a guide for the type product to be used. It was not intended or thought required to be the final choice of products.
>
> "* * * [subsequently] an investigation of many track surfaces was made. This consisted of a review of literature and specifications of various materials, site inspection of actual track surfaces, discussions with manufacturers and discussions with owners of tracks. * * * Tracks were visited in Texas, New Mexico, Utah, Oregon, and California. The surface materials seen were 'Reslite,' 'Atlas,' 'Chevron 400 System,' ACl '500 System,' 'Track-life,' Chevron '440 System,' and 'Marathon.' Other material specifications were reviewed, but no installations of them were found in the West or southwest.
>
> "From these studies three types of surfacings were selected as the type desired for these tracks. Each material type represented a different price range and base material as follows:

Type	Produce Name	Price Range (sq. yd.)
Rubber-asphalt	Atlas All-Weather	$6 to $8.50
Rubber-urethane	Chevron 400	$16 to $20
Urethane	ACl 500 System	$27 to $30

> "The selected material in each price range, in our opinion, possessed better surface appearance, resiliency, overall wear qualities, and running qualities, and easier and less expensive maintenance. Spot patches on each could be made.
>
> "The sand-asphalt-aggregate surfaces such as 'Reslite' * * * were not selected because most of the ones seen suffered from spalling of the surface leaving exposed rock and loose sand. They also appeared to lose their resiliency with age and also had a non-uniform surface appearance. Maintenance of them was difficult without a total resurfacing at a cost of about $10,000."

Although Malott may disagree with the result of the engineer's review (which we note does not foreclose consideration of bids based on rubber-urethane surfaces, or bids by firms other than Atlas offering the brand name or offering "equals"), and the judgment based thereon, we do not consider that Malott has shown them to be unreasonable.

Moreover, and notwithstanding that we have at this time considered under our Public Notice the merits of Malott's complaint on the above issue, we believe that it would have been preferable for Malott to have raised with the grantee the contention that

Reslite is as acceptable as the Atlas product for the grantee's needs while action to correct or revise the solicitation, if deemed necessary, without prejudice to other potential bidders was still practicable, i.e., to have either filed a formal complaint with the grantee prior to bid opening, or to have availed itself of the qualification procedures set forth in the solicitation. In 50 Comp. Gen. 565, 576 (1971), we quoted the following language from our decision in B-156025, May 4, 1965, to reflect our views regarding specification errors in direct Federal procurements:

> "* * * We feel that good faith and observance of the spirit of competitive solicitation, as well as sound business practice on the part of competitors for Government contracts, dictate that the appropriate time for a detailed examination of the solicitation and clarification of any provision thereof * * * is prior to the time specified for submission of proposals or bids. * * * The submission of a protest after such time, on matters which the competitor considered material to his quotation or bid and on which he could reasonably be expected to have had clarified during the period in which he was computing his price, necessarily raises a question as to the sincerity of the protest, frequently operates as a hinderance to the procuring activity in obtaining urgently needed items in a timely manner, increases the administrative costs of the procurement, and seriously detracts from the benefits derived by the Government."

See in this connection the filing requirements of section 20.2 of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), under which we consider protests against procurement actions by Federal agencies.

In regard to whether Malott's bid was properly rejected as nonresponsive, as indicated in paragraph 3c(2) of Attachment "0" to FMC 74-7, where a solicitation requests bids on a brand name or equal basis, the determination whether an "equal" is acceptable must be made in view of the salient characteristics of the brand name which are necessary to satisfy the issuer's needs. Those characteristics are generally listed in the solicitation. See FPR § 1-1.307-4 (1964 ed. amend 85). The prohibition against the use of a sand or gravel filler was clearly a mandatory feature, see Schottel of America,Inc., B-190322, February 15, 1978, 78-1 CPD 130, and it is not disputed that Reslite is unacceptable because of that feature. Further, it is not relevant that this reason for the rejection of Malott's bid was proferred only after it was determined that the original reason for such rejection might not have been proper. See Techniarts, B-186638, October 12, 1976, 76-2 CPD 327. The concept of responsiveness, i.e., the conformance of a bid as submitted to the material requirements of a formally advertised solicitation, is basic to a system of competitive bidding. Griffin Construction Company, B-185474, November 29, 1976, 76-2 CPD 452. Moreover, since Malott's bid was not responsive to the invitation, the fact that its price was lower than Atlas' is irrelevant.

Accordingly, we consider the grantee's rejection of Malott's bid to have been proper for the reason proferred in the EDA report. The matter of the durability of Reslite as a cause for rejection is, therefore, academic and will not be considered. Further, since Malott did not utilize the procedures in Section 1 of Part II of the solicitation to show the alleged equality of its

product to Atlas', we cannot agree that such section imposed a duty on the grantee to notify Malott before bid opening whether Reslite was in fact acceptable. In this connection, although the engineer may have had Reslite specifications in hand 10 days before bid opening, it is not disputed that Malott did not attempt to show Reslite's equality to the Atlas product in the manner set forth in the solicitation.

Finally, Malott's claim for bid preparation costs is based on its view that:

> "The facts point heavily toward the existence of a predetermination of the eventual contractor rendering the subsequent bidding procedure a sham to conceal an intention to let the contract to a favored bidder, or to a failure by the grantee to fairly and impartially consider each bid. Heyer Products Co. v. United States, 140 F. Supp. 409. * * *"

However, in view of our discussion above indicating that the procurement was properly conducted, the claim could not be allowed. Consequently, the question whether a bidder on a grantee procurement can receive bid preparation costs based on the Heyer standard will not be decided. See E.D.S. Federal Corporation, B-190036, May 11, 1978, 78-1 CPD 359; Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 911, 932 (1976), 76-1 CPD 202.

R.F. Keller

Deputy Comptroller General
of the United States